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No. 09-423

In The

Supreme Court of the United States

RALPH L. STACEY, JR., EXECUTOR OF THE ESTATE OF MARIE STACEY, DECEASED,

Petitioner,

v.

PATRICIA M. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented on this petition is whether the state courts denied Petitioner due process of law at important stages of his civil appeal, in derogation of this Court's decisions under the Due Process Clause of the United States Constitution guaranteeing civil litigants fair hearings in state courts, when the state courts acted in the following manner:

1. When the state court of appeal held that Petitioner waived his right to challenge the trial court's judgment on the ground it was not supported by substantial evidence because the detailed record of the trial proceedings which Petitioner had provided on appeal did not specifically reference each and every piece of evidence adduced at trial, i.e., "all" the evidence. By arbitrarily failing to employ the nearly universal standard which permits a civil appellant to advance a substantial evidence argument on the basis of a "fair statement" of the trial evidence, the state court denied him his due process rights.

2. When the state court of appeal failed to act on a motion which Petitioner had filed, before oral argument, which would have furnished details allegedly missing from the "fair statement" of the evidence which Petitioner had already provided and would have mooted the waiver issue altogether.

3. When the state court of appeal, after having found a waiver of the substantial evidence issue, decided Petitioner's other issues on the basis of fact statements and inferences that find no support in the trial record.

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

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OPINIONS BELOW

Respondent initiated this action in the California Superior Court for the County of Los Angeles on September 10, 2002. Her Petition sought to invalidate her mother-in-law's third will and trust. Those documents had left everything to Petitioner, the decedent's sister. Respondent claimed the recent documents had been procured by Petitioner's undue influence and that the estate should pass to Respondent pursuant to decedent's second testamentary plan. Respondent claimed her mother-in-law had changed her original will and trust (which had also preferred Petitioner over Respondent) and made Respondent her beneficiary because Respondent had been decedent's primary caregiver for a period of time while Petitioner resided out of state. Petitioner denied Respondent's assertions. She claimed her sister had acted entirely on her own and that she had made the final amendments because Respondent had mistreated her and had mishandled her money.

Respondent prevailed at a bench trial on her undue influence claim and Petitioner appealed to the Court of Appeal for the State of California (Second District, Division Eight No. 180387). While that appeal was pending, a second superior court judge issued an ex parte order granting Respondent's request that Petitioner turn over certain estate property allegedly in her possession. Petitioner appealed from that order as well (Second District, Division Eight No. 187641), and the appeals were consolidated under the earlier number. The Court of Appeal reversed

the superior court's judgment and order on September 29, 2006. It concluded that the superior court had failed to provide Petitioner with the formal statement of decision to which she was entitled following trial (explaining the factual and legal bases for its decision) and had denied Petitioner fundamental due process with respect to its ex parte order. It therefore remanded the case for preparation of a formal statement of decision which addressed the material issues and made appropriate findings supported by substantial evidence.

On remand, the superior court prepared a 29 page Statement of Decision. The April 18, 2007 Statement of Decision is reprinted in Appendix, App. 27-54. The court also entered a new judgment in Respondent's favor. The May 10, 2007 judgment is reprinted in Appendix, App. 24-26. Petitioner appealed from the superior court's judgment to the California Court of Appeal (Second District, Division Eight No. B200516). On April 8, 2009, the Court of Appeal issued its unpublished opinion which affirmed the superior court's new judgment in all respects. The Court of Appeal's opinion is reprinted in Appendix, App. 1-23. Petitioner timely petitioned the Court of Appeal for rehearing, detailing the reasons he believed he was denied due process in the course of the proceedings. Those reasons are set forth and discussed in the argument portion of this Petition. The Court of Appeal denied the Petition without comment on May 1, 2009. The Court of Appeal's order denying rehearing is reprinted in Appendix, App. 55.

On May 19, 2009, Petitioner filed a Petition for Review in the California Supreme Court (S173036). Petitioner sought review on similar grounds, i.e., that he had been denied due process for the reasons discussed in the following argument. Petitioner asked the California Supreme Court to exercise its discretionary powers and accept the case for the purpose of clarifying California law with respect to the standard of review on substantial evidence appeals and, in doing so, to correct the Court of Appeal's other errors and afford justice in this case. The California Supreme Court denied Petitioner's Petition for Review without comment on July 8, 2009. The California Supreme Court's order denying review is reprinted in Appendix, App. 56. There are no official citations to any of the foregoing documents.

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the California Superior Court for the County of Los Angeles. The court entered judgment in favor of Respondent. Petitioner timely appealed to the California Court of Appeal. The California Court of Appeal entered its opinion on April 8, 2009. The California Court of Appeal denied Petitioner's Petition for Rehearing on May 1, 2009. The California Supreme Court denied Petitioner's discretionary Petition for Review on July 8, 2009. This Petition is timely under Supreme Court Rule 13.1, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 14.1(e), Petitioner provides the following specific information:

(i) Date the judgment or order sought to be reviewed was entered:

April 8, 2009, by the California Court of Appeal

(ii) Date of any order respecting rehearing/ extension of time:

July 8, 2009, by the Supreme Court of California

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. § 1254(1)

(v) Rule 29.4 statement:

Not applicable to this Petition

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

United States Constitution, amendment 14, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Patricia Tierney ("Patricia") sued Petitioner Marie Stacey ("Marie") in 2002 to invalidate a will and trust by which Marie's sister, Edna, had left her estate to Marie. Patricia was the widow of Edna's only son and thought that she should inherit under an earlier will and trust. She alleged Edna had made the change because Marie had unduly influenced her. The trial court agreed and entered judgment for Patricia. The judgment merely decreed that the 2002 amendments were "void." It contained no other determinations, and it set forth no findings or conclusions. Marie filed her first notice of appeal (B180387).

More than 10 months later, while Marie's first appeal was pending, a different superior court judge granted Patricia's ex parte application and ordered Marie to transfer Edna's Long Beach residence to Patricia "forthwith," pay Patricia "forthwith" the sum of $115,422.20 (the alleged value of "all assets of the decedent that existed as of the date of decedent's death") and the further sum of $34,667.72 (money

which Patricia claimed Marie improperly paid to herself and family members during Edna's lifetime). Marie filed her second notice of appeal (B187641). The appeals were consolidated, and Marie made three major contentions on the combined appeals: (1) the trial court failed to prepare a statement of decision even though she had timely requested one, (2) the judgment and ex parte orders were not supported by substantial evidence and (3) the ex parte orders were entered without affording Marie a fair opportunity to respond.

The Court of Appeal reversed and directed the trial court to prepare a statement of decision which (1) provided the findings and predicate facts (if any) "required to sustain the ex parte orders," (2) clarified "who holds title to [Edna's former residence]" and (3) served the ends of justice by "sift[ing] and weigh[ing]" the evidence of undue influence and providing an "extended and nuanced" discussion of that evidence. The Court did not address Marie's substantial evidence argument.

On remand, the trial court prepared a 28 page statement of decision which, though lengthy, did not address the two sums of money, title to Edna's home or any of Marie's affirmative defenses. Marie therefore appealed again (B200516). She maintained (1) the trial court's statement of decision was still defective because it did not address important controverted issues, not even those (above) which the Court of Appeal had specifically directed it to address following Marie's first appeal, and (2) the judgment

was not supported by substantial evidence in the record. Marie's counsel filed a 56 page opening brief which contained, *inter alia*, a five page Procedural History section and a nine page Statement of Facts. Those sections of the brief are replete with accurate citations to the appellate record, and they are bolstered with additional fact statements (and record citations) throughout the balance of the brief. In conformance with state law governing substantial evidence appeals, the Statement of Facts fully identified and discussed both the general categories of facts and the specific facts which would tend to support the superior court's judgment. Marie's reply brief responded to Patricia's responding argument that Marie had not presented all the evidence favorable to the judgment. After filing her reply brief, but before the case had been orally argued, Marie moved for permission to file a supplemental statement of facts to ensure that, in the event the Court of Appeal might use an "all the evidence" standard, literally "all" of the relevant facts would be before the Court.

The Court of Appeal did not rule on that motion. Instead, two weeks following oral argument, it affirmed the judgment in an opinion which found substantial evidence in the record. However, it also impliedly adopted Patricia's argument that Marie had waived her substantial evidence claim because she did not specifically identify and discuss "all" of the specific pieces of evidence which would support the judgment. It also concluded the superior court did not need to address the two sums of money in its

statement of decision because these sums were only "demands for settlement." (App. 14.) It also concluded that findings regarding specific sums were not necessary because Marie held whatever monies she did acquire in constructive trust for Patricia. *Ibid.* The Court made a similar determination with respect to the title issue, i.e., it concluded the statement of decision's failure to address that issue was of no moment because "*If in fact* Marie Stacey's estate . . . holds title . . . [it] does so . . . as constructive trustee. . . ." (App. 15; emphasis added.) The Court also found there was no substantial evidence in the record to support Marie's affirmative defenses. (App. 15-18.)

ARGUMENT FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO ENSURE THAT LITIGANTS ON SUBSTANTIAL EVIDENCE APPEALS IN STATE COURTS RECEIVE THE DUE PROCESS PROTECTIONS OF THE FOURTEENTH AMENDMENT.

A. Background: Federal Due Process

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no state may "deprive any person of life, liberty, or property, without due process of law. . . ." The federal Due Process Clause "expands the requirement of fundamental fairness. . . ." *Lassiter v. Department of Social*

Services, 452 U.S. 18, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648 (1988). The task, therefore, is to "discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Ibid.*

It is clear that state action prohibited by the Fourteenth Amendment may be judicial in nature. See *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 718, 11 L.Ed.2d 686, 697 (1964). However, the Due Process Clause does not mandate a judicial proceeding in every case, or guarantee a correct result in a particular case, or require consistency in judicial decisions. See *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944); *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 58 S.Ct. 185, 188, 82 L.Ed. 268, 275 (1937). It does not even guarantee persons the right to appeal from adverse state court judgments. *McKane v. Durston,* 153 U.S. 684, 14 S.Ct. 913, 914, 38 L.Ed. 867, 868 (1893). Nevertheless, once a state provides process and particular rights and remedies, the federal Due Process Clause may require that it administer them fairly and evenhandedly. For example, as early as 1939, this Court declared that, if a court adopts a new procedure, the purported change in procedure may not cut off all remedy. Unless the new procedure leaves a reasonably sufficient remedy to enforce an existing right, the right itself is affected and the state procedure will be held invalid as an impairment of an established substantive right. See *Lane v. Wilson,* 307

U.S. 268, 59 S.Ct. 872, 876, 83 L.Ed. 1281, 1283 (1939).

In *Boddie v. Connecticut,* 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113, 118 (1971), this Court reflected upon a hundred years of its efforts "to give concrete embodiment to [the] concept [of due process]." It determined that two important principles were "firmly embedded" in its jurisprudence. *Ibid.* First, "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Ibid.* Second, "a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Id.*, at 401 U.S. 379, 91 S.Ct. 787, 28 L.Ed.2d 120. Applying these principles and precedent, the Court determined that enforcement of a Connecticut statute which required payment of filing and service of process fees to initiate a legal action for dissolution of marriage was an unconstitutional denial of due process when applied to bar judicial access to indigent persons who lacked the necessary financial resources. *Id.*, at 401 U.S. 380-381, 91 S.Ct. 787, 28 L.Ed.2d 120-121. Utilizing a *Lassiter*-style analysis (*Lassiter v. Department of Social Services*, *supra*, 452 U.S. 18, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648 (1988)), the Court examined the state's interests in imposing the fee and

the interests of the plaintiffs-appellants in obtaining access to the court and concluded the state's interests were insufficient. *Id.*, at 401 U.S. 381-383, 91 S.Ct. 788-789, 28 L.Ed.2d 121-122.

B. The Denial of Due Process in this Case

Petitioner maintains that the holdings and rationales of the foregoing decisions of this Court are squarely at odds with the practices and procedures of the California Court of Appeal and the California Supreme Court in this case. The Court of Appeal's opinion states Petitioner is deemed to have waived his major substantive arguments (that Marie did not "actively participate" in procuring the documents or receive an "undue profit") because he relies on only those facts that support his position and ignores the evidence that favors Respondent and supports the judgment: "[A]n appellant may not rely on only those facts that favor his or her side of the question and ignore the evidence that favors the Respondent and supports the judgment." (App. 18.) The opinion appears to have accepted Respondent's argument that appellants must present "all the material evidence on the point and not merely their own evidence." (Responding Brief at p. 7, quoting *Nwosu v. Uba,* 122 Cal.App.4th 1229, 1246 (2004).) However, even the *Nwosu* decision recognized that there is an alternative, "fair statement" standard that does not require mention of every piece of evidence admitted at trial. *Ibid.* The distinction is important in this case because (as is explained more fully below) the trial

court appears to have engaged in a less thorough review of the facts, law, evidence and history of the case (after having concluded Petitioner did not present all the evidence favorable to the judgment) than it might otherwise have done. (See, e.g., App. 19 ["[W]e need not discuss (particular issues) at all since Stacey is deemed to have waived this contention"]; App. 21 ["We find it unnecessary to address in detail other purported defects in the statement of decision. . . ."]; App. 22 ["no need to specify the exact amount of (checks Marie signed)"].) Petitioner's arguments on appeal demonstrated the importance of these issues and the errors in the trial court's decision. (See discussion, *post.*)

Furthermore, the cases cited by the Court of Appeal and other cases which have found a waiver are factually distinguishable. For example, in *Nwosu v. Uba,* 122 Cal.App.4th 1229, 1246 (2004) the pro per appellant provided no citations to the transcript and failed to discuss the evidence material to his contentions. In *Huong Que, Inc. v. Luu,* 150 Cal.App.4th 400, 409-410 (2007) (also cited by Respondent), the appellant apparently made no effort to provide a fact discussion or citations to the record. In *Bocken v. Phillip Morris, Inc.,* 127 Cal.App.4th 1640, 1658 (2005), the record consisted of at least 25 volumes of reporter's transcripts but the appellant provided only the "briefest summary of the trial evidence and summarized only those facts which supported its theories." In *Bresnahan v. Chrysler Corp.*, 65 Cal.App.4th 1149, 1153 (1998), appellant's brief presented only

evidence favorable to appellant and appellant's nine volume transcript was not properly paginated or indexed. Finally, in *Brockey v. Moore,* 107 Cal.App.4th 86, 96-97 (2003), the opening brief mentioned "almost none" of the facts that would support the jury's verdict and injunction and the brief "misled" by making false implications. Indeed, at no point in its opinion does the Court of Appeal explain how Petitioner's factual record is deficient or why the cited cases should control the result in this case. This constitutes a further denial of due process.

In this case Petitioner made a serious and conscious effort to present, both in detail and in summary fashion, all of the material facts supportive of the parties' evidence at trial and of the court's judgment. Petitioner's statement of facts in his opening brief is nine pages long and it is replete with accurate citations to the appellate record, including citations to all evidence (or categories of evidence) supportive of the judgment. (Opening Brief at pp. 6-14.) For example, Petitioner acknowledges Respondent's evidence of Edna's confusion, her physical and mental weaknesses, her dependency on others to provide for her care and her susceptibility to being influenced by Petitioner and others. Petitioner also acknowledged the testimony and other evidence about Petitioner "undoing" the care plan and caregiver beliefs that Petitioner was planning to take over Edna's finances and that Edna needed an advocate. (See Opening Brief at pp. 12-13.) Petitioner's purpose in presenting and discussing this evidence in this

detail was to provide a backdrop to show that, in the context of all the evidence, Respondent's evidence was not legally sufficient to support the judgment. Petitioner believes that the major pieces of material evidence which the superior court relied upon are acknowledged and discussed in Petitioner's appellate briefs.

As a related matter, Petitioner's procedural history is five pages long and it, too, cites liberally and accurately to the appellate record. (See Opening Brief at pp. 14-19.) Petitioner's briefs also contain numerous record citations and references to Respondent's evidence in their argument segments. The record also contains a complete and properly prepared reporter's transcript and proper appendices, including the appendices of the earlier appeal. In addition, Respondent filed a number of exhibits which supported the judgment, and Petitioner made every effort to ensure that all of the trial exhibits were before the court for its review and consideration. He also filed a formal motion, before oral argument and well before the Court of Appeal issued its opinion, to file a supplemental statement of facts to further discuss the exhibits which he believed he had summarized in his appellate briefs, but the Court did not act on his motion. (See discussion following.) In short, Petitioner made every effort to fairly summarize all of the evidence favorable to the judgment in his appellate briefs without unduly burdening the court and counsel. (See *Bocken v. Phillip Morris, Inc., supra*, 127 Cal.App.4th at p. 1658 [an appellant's duty is to

"fairly summarize all of the facts in the light most favorable to the judgment"].) Petitioner believes he accomplished that in this case, and that this Court should clarify that this is the standard upon which the question of substantial evidence waivers should be determined.

C. The Further Prejudice Which Petitioner Sustained Because of the State Court's Initial Denials of Due Process

Petitioner believes that the opinion contains a significant number of inaccurate fact statements and omits facts that are material to a determination of the issues on appeal. He believes the Court's willingness to find a waiver permitted it to examine and consider the record and Petitioner's arguments less thoroughly than it might otherwise have done. A few examples will highlight the issue. (A complete discussion of these matters is contained in Petitioner's Rehearing Petition at pages 4-8.)

A first example is the court's statement (App. 3) that Petitioner was the (first) contingent beneficiary under Edna's original, August 1999 trust. The court fails to acknowledge (or address elsewhere in its opinion) that Respondent was the second contingent beneficiary under the 1999 trust, after Petitioner. (RT 107; exhibits 23, 25.) These facts are material because they unequivocally evidence Edna's intention, in August 1999, to prefer Petitioner as her beneficiary ahead of Respondent. They are also material because

the court elsewhere places great emphasis on the length of time ("35 years") which it states Respondent "had been actively taking care of Edna." (App. 10.) The omitted facts demonstrate Edna's belief in August 1999 that her relationship with her sister was more compelling than any care which Respondent might have provided up until then.

In this context, it is also necessary to address the Court's statement (App. 4-5) that Respondent "assisted Edna after Edna's husband died in 1971 by looking after her healthcare and financial needs [by driving] her to doctor's appointments, [running] errands for her, [paying] her bills, and balanc[ing] her checkbook." The trial court talked of Respondent's many years of "servitude." (App. 41.) The Court of Appeal's opinion echoes that with its references to Patricia's "active[] care of Edna for 35 years" and "Patricia's 35 years of loyal assistance and support." (App. 10, 21.) The suggestions, of course, are that Edna required this assistance for this extended period and that Respondent selflessly provided it for 3.5 decades. The record, however, does not appear to bear that out.

First, Respondent's own testimony was that she did *not* assist with Edna's healthcare and financial needs at all times since 1971. She actually testified that Edna was self-reliant and able to care for herself and look out for her own needs for many years after her husband's death. (RT 99-103.) Respondent only helped by driving Edna places for a while, but she stopped doing even that when Respondent's mother's

poor health prevented her from spending much time with Edna. *Ibid.* In fact, it does not appear that Respondent became involved with Edna's finances until about 1998, three years before Edna returned home from the skilled nursing facility in 2001. (RT 110 et seq., 119-120.) The record (especially Respondent's brief and its citation to 2008 AA at pp. 57, 59) simply does not appear to support the court's statements (or suggestion) that Respondent provided decades of needed assistance to Edna.

The opinion states "[Respondent] acted as Edna's primary caregiver throughout Edna's illnesses." (App. 3.) But the preceding materials raise doubts about the correctness of that conclusion. Furthermore, Edna's son (Respondent's husband) and others assisted Edna (when Edna required assistance) as well. (RT 100 et seq.) Indeed, the in-home workers and Petitioner were Edna's primary caregivers the last six or seven months of Edna's life. (See also Petitioner's Opening Brief at p. 41 and record references.) Finally, Edna's attorney, Mr. Zommick, testified that it was really Dr. Messenger who was Edna's "primary caretaker, physician." (RT 228.)

The opinion also states that, shortly after her arrival in California, "[Petitioner] contacted a new attorney, i.e., not the attorney who had drafted the trust, to discuss Edna's estate." (App. 5.) However, the opinion does not mention that the new attorney was not one of Petitioner's choosing but rather an attorney who had been recommended by Edna's hairdresser. (RT 163, 209, 259.) Furthermore, "to discuss

Edna's estate" suggests that Petitioner discussed the substance of Edna's estate plans or Edna's specific wishes or intentions with Mr. Zommick. But there is nothing in the record to support that suggestion. Instead, the record shows Petitioner contacted the hairdresser-recommended attorney so *Edna* could discuss her estate with him herself. (See RT 209.) And that is unquestionably what happened. Mr. Zommick was quite clear that he had no substantive estate discussions with Petitioner. (See Opening Brief at pp. 8 et seq. and record references.) These omitted facts are material to the issue of Petitioner's alleged active participation in the procurement of Edna's March 2002 trust and support Petitioner's position that she provided only the most limited assistance to her sister when she told Petitioner she wanted to speak with an attorney about her trust and will.

As a related matter, the opinion is also silent with respect to the trial evidence which details the reasons Edna wanted to amend her trust and will in 2002, i.e., Edna's belief that Respondent was not handling her money in a proper fashion and because she felt Respondent and her children had often ignored her and hadn't treated her very well otherwise. (See, e.g., Petitioner's Reply Brief at pp. 16-17 and record citations.) This omission, like the other omissions discussed herein, are important because they provide the context in which the sufficiency of the trial evidence is evaluated. (See discussion, *post*.)

The opinion also states that "[Petitioner] was present during the majority of the discussions about the March 2002 Amendment." (App. 7-8.) But Mr. Zommick testified that he discussed substantive matters only with Edna during his initial conference with her, that Petitioner was present only part of the time during the office visit and that Petitioner was not present at all during his discussions with Edna at Edna's home or when Edna executed the March 2002 documents. (RT 210-211, 234. See also opening brief at pp. 8 et seq. and record references.) There was no contrary evidence.

The opinion's statement that Mr. Zommick did not provide Edna with a copy of the letter he had written to Respondent on Edna's behalf is also questionable. (App. 8.) Mr. Zommick testified, without contradiction, that he was almost certain she had received a copy. (RT 230.) Furthermore, even if the trial court had discounted Mr. Zommick's testimony entirely (and it's not clear whether it did or not; it found Mr. Zommick "not credible" but simultaneously determined his testimony was entitled to some (i.e., "very little") weight – see App. 37), disbelief of Mr. Zommick on this point does not establish the contrary, i.e., it does not create affirmative proof that Edna did not receive his letter. (Estate of Burlew, 146 Cal.App.2d 642, 649 (1956).)

The court's statement that Mr. Zommick did not, in fact, inquire about prior attorneys (App. 7) does not appear to accurately reflect Mr. Zommick's

testimony, i.e., that he did not remember doing so. (RT 225.)

The court points out that, in his deposition testimony, Mr. Zommick states he would have taken further steps to determine whether Edna was under anyone's influence if he had known about her medical condition and medications. (App. 7.) But the opinion omits reference to Mr. Zommick's trial testimony, i.e., that his deposition response was made with reference to "the general context before we got into the specifics of this case. . . ." (RT 224-225.) As far as this case was concerned, Mr. Zommick was plainly satisfied, based upon his meetings and conversations with Edna, that she was not being influenced (much less unduly influenced) with respect to her estate wishes. (See Petitioner's Opening Brief at pp. 8-12 and record references. See also RT 231-232 [Mr. Zommick stating he might not have done anything differently even if he had known of Respondent's concerns].)

The court's opinion emphasizes the trial court's reasons for faulting Mr. Zommick's performance of his professional duties and for placing "very little weight" on Mr. Zommick's conclusion that Edna was not being subjected to Petitioner's influence. (App. 7-8.) But neither the trial court nor the Court of Appeal explains why or how Mr. Zommick's performance was legally inadequate, and neither court offers a legal basis for finding Mr. Zommick not credible and rejecting his conclusions. These omissions are also material.

Finally, the opinion also states that the trial court did not need to make findings regarding the sums of $115,442 and $34,667 because "these sums were demands for settlement." (App. 14.) Again, though, there does not appear to be any record support for that characterization. In fact, those sums were the full amounts which Respondent believed Petitioner had wrongfully appropriated from Edna and they were the sums which Respondent hoped to recover from Marie at trial. (See Petitioner's Opening Brief at pp. 16-17 and record references.)

SUMMARY

Although no United States Supreme Court case has yet addressed the specific issues raised by this Petition, established Supreme Court precedent supports the conclusion that Petitioner was denied federal Constitutional Due Process at major stages of the appellate proceedings in this case. First, without providing any notice that it might do so, the Court of Appeal applied a rarely used, "'all' the evidence" standard of review to Petitioner's substantial evidence argument rather than the more common, "fair statement" standard. Furthermore, as shown above, it did so in reliance on cases that are entirely distinguishable on their facts.

Second, the Court of Appeal decided Petitioner's substantial evidence argument without ever acting upon Petitioner's motion to file a supplemental

statement of facts to augment Petitioner's existing, nine page "fair statement" of the facts. Petitioner had filed the motion, out of an abundance of caution and before oral argument, in response to Respondent's "all the facts" argument in her responding brief. This entire issue would have been rendered moot had the Court of Appeal considered and granted Petitioner's motion.

Third, perhaps as a consequence of the foregoing, the Court of Appeal fashioned an opinion that misapprehends and misstates material facts and declines to decide major issues on appeal.

These concerns were presented to the Court of Appeal in Petitioner's Petition for Rehearing, and to the California Supreme Court in Petitioner's Petition for Review, without success.

Using the evaluative process established by *Lassiter v. Department of Social Services,* 452 U.S. 18, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648 (1988), Petitioner's interests were to be able to rely upon the standard of review common on substantial evidence appeals in California. If the Court of Appeal contemplated using a different, stricter standard of review, Petitioner was entitled to sufficient notice of that fact so that he could amend and modify his filings accordingly. He was also entitled to have the Court of Appeal rule upon his motion so he could meet that stricter standard (first suggested in Respondent's Brief) before argument and decision in the event the Court was persuaded to use the stricter

standard. Petitioner also expected that the Court of Appeal would base its opinion on a fair statement of the facts, and that the opinion would consider all of the issues he raised on appeal.

On the other hand, the Court of Appeal's sole discernable interest would be the efficient processing of its appellate caseload. Petitioner maintains that that interest was not threatened by anything Petitioner did in this case, and that any benefit the Court of Appeal might have gained by proceeding as it did and disposing of the case in so summary a fashion denied Petitioner a fair hearing and Constitutional Due Process.

Petitioner finally maintains that the California Supreme Court should have discharged its duty to oversee and facilitate the administration of justice in California by granting review to address these issues, issues which affect large numbers of civil appellate litigants annually. It is charged with ensuring fairness and due process in California's courts, yet it failed to act to ensure that Petitioner received the federal Constitutional Due Process to which he believes he is entitled.

CONCLUSION

Civil litigants in California and elsewhere who make substantial evidence arguments on appeal often face conflicting standards of review, as stated or as applied. In this case, the California Court of Appeal

and the California Supreme Court have declined to acknowledge the existence of, or apply, the federal due process protections which would have afforded Petitioner the fair hearing which the Fourteenth Amendment to the United States Constitution guarantees. They have further declined to extend the due process protections of the California Constitution to Petitioner on his appeal. This Court should grant the Petition and declare that judicial selection and application of a standard of review on substantial evidence appeals is subject to the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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Dated: October 6, 2009

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PATRICIA M. TIERNEY, Plaintiff and Respondent, v. RALPH L. STACEY, JR., as Executor, etc. Defendant and Appellant.	B200516 (Los Angeles County Super. Ct. No. NP 009743) (Filed Apr. 8, 2009)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy Paul, Judge. Affirmed.

Jeffrey L. Garland for Defendant and Appellant.

Velasco Law Group, Richard J. Radcliffe; Madden, Jones, Cole & Johnson and Montgomery Cole for Plaintiff and Respondent.

* * *

Respondent Patricia M. Tierney filed a petition to set aside an amendment to the Edna P. Tierney Living Trust (hereafter the March 2002 amendment), which made Marie Stacey the sole beneficiary under the trust. Following a two-day trial in October 2004, the court granted the petition, concluding that the March 2002 amendment was the product of undue influence exercised by Stacey. Judgment was entered in October 2004.

In the ensuing appeal from the judgment, we concluded that a statement of decision should have been prepared and we remanded with directions to prepare and file a statement of decision. (*Tierney v. Stacey* (Sept. 19, 2006, B180387) [nonpub. opn.] (herefter *Tierney I*).) We also addressed a number of ex parte orders that were entered in September 2005 by the Honorable Joseph Di Loreto; the trial judge had been the Honorable Roy L. Paul. Among other things, two of these orders required Stacey to pay Tierney $115,442 and $34,667.[1] There was nothing in the October 2004 judgment that supported these orders. We concluded that the court lacked jurisdiction to enter the ex parte orders of September 2005 and we therefore set aside and vacated those orders.

Following our remand, the trial court, per Judge Paul, prepared and filed a statement of decision. A judgment providing that the March 2002 amendment was void due to undue influence was entered on May 10, 2007, and this appeal followed. We affirm.

FACTS

1. Introduction

Edna P. Tierney, the decedent, was 86 years old in March 2002. Her only son, Joseph Tierney, died from cancer in October 2001. Respondent Patricia

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[1] Cents are omitted.

Tierney was Joseph's wife. Marie Stacey was Edna Tierney's sister.

Joseph Tierney was the sole beneficiary under the trust. Until September 21, 2000, Marie Stacey was the contingent beneficiary in the event of Joseph's[2] death. On that day, Edna replaced Marie with Patricia Tierney. This amendment specifically provided that Marie was to take nothing from the trust estate.

As we set forth more fully below, Edna Tierney suffered from several serious maladies and spent two months in a nursing home prior to January 2002, when she was released to go home. Patricia acted as Edna's primary caretaker throughout Edna's illnesses.

On February 25, 2002, Marie Stacey came from her home in Cincinnati, Ohio, to help with Edna's care and stayed until Edna died on August 25, 2002.

On March 8, 2002, Edna amended the trust again by removing Patricia Tierney as beneficiary and making Marie Stacey the sole beneficiary under the trust. It is this amendment, i.e., the March 2002 amendment, which is the subject of this appeal.

Marie Stacey died on October 26, 2007. Appellant Ralph L. Stacey, the executor of her estate, was

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[2] From time to time and where it causes no confusion, we refer to the parties by their first names. We do so for brevity's sake and intend no disrespect thereby.

substituted for Marie by our order of February 1, 2008.

2. The Statement of Decision

The appeal focuses on a number of alleged shortcomings of the statement of decision. A consideration of these contentions requires a summary of the statement of decision. In setting forth the summary, we adopt the outline and headings of the statement of decision. From time to time, we delve directly into the record.

(a) Background

Edna suffered from a number of serious medical conditions, including congestive heart failure, which caused her to be hospitalized on a regular basis; in 2002, she was taking 19 medications per day. In June 1999, Edna became the first patient in the Tele Medicine (Tele-Med) program adopted by Long Beach Memorial Hospital. The Tele-Med program allowed the hospital to place a video monitor in Edna's home. A participant in the Tele-Med program is required to have sufficient caregivers in the home to ensure that the patient takes his or her medicines and that the patient's daily needs are met. When Edna was released from a two-month stay in a nursing home in January 2002, she required 24-hour care.

Patricia and Joseph assisted Edna after Edna's husband died in 1971 by looking after her healthcare

and financial needs. They drove her to doctor's appointments, ran errands for her, paid her bills, and balanced her checkbook. After Edna's son Joseph died, Patricia continued to take responsibility for Edna's finances, banking and healthcare needs.

Marie Stacey, then about 80 years old, arrived on February 25, 2002. Within weeks of arriving, Marie terminated all of Edna's home care providers and forced Long Beach Memorial Hospital to remove the Tele-Med monitor. Three days after her arrival, Marie contacted a new attorney, i.e., not the attorney who had drafted the trust, to discuss Edna's estate. Marie also assumed control over Edna's banking and other financial accounts. And, as already noted, it was on March 8, 2002, that the amendment removing Patricia and making Marie the sole beneficiary was executed.

(b) Burden of Proof Requirement on the Issue of Undue Influence

The statement of decision states the applicable law on undue influence.

(c) Findings

The court ruled that the following three factors established a presumption of undue influence: There was a confidential relationship between Marie and Edna; Marie actively participated in the Procurement of the March 2002 amendment; and Marie received an undue profit from the March 2002 amendment in

that Patricia Tierney was a more obvious object of Edna's testamentary disposition than Marie.[3]

(1) Confidential Relationship Between Marie and Edna

The court found that the existence of a blood relationship between Marie and Edna showed that there was a confidential relationship between them. In addition to this circumstance, the court found that the interaction between the two women showed that there was a confidential relationship. Shortly after her arrival in February 2002, Marie took over the role of primary caregiver, fired the previous caregivers, and barred Patricia Tierney from entering the house. Marie also assumed complete control over Edna's finances.

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[3] "In this state, a presumption of undue influence arises when there is a concurrence of the following elements: 1) the existence of a confidential or fiduciary relationship between the testator and the person alleged to have exerted the undue influence; 2) active participation by such a person in preparation or execution of the will; and 3) an undue benefit to such person or another person under the will thus procured [citations]." (*Estate of Clegg* (1978) 87 Cal.App.3d 594, 602.) We do not agree with appellant that there are six components to the presumption of undue influence.

(2) Marie Actively Participated in the Procurement of the March 2002 Amendment

Three days after she arrived, Marie telephoned Attorney Kenneth Zommick and inquired if he could assist Edna in changing or amending the trust. He said yes, after which Marie passed the telephone to Edna who told Zommick that she wanted to leave everything to Marie. On March 4, 2002, Marie accompanied Edna to Zommick's office where Edna and Zommick discussed, in Marie presence, Edna's wish to leave everything to Marie. On March 8, 2002, Zommick came to Edna's house with the March 2002 amendment that Edna signed while Marie was in another part of the house.

According to Zommick, Edna was not under Marie's influence when it came to the March 2002 amendment. Although the court noted that Zommick was a competent attorney with "significant experience," the court placed "very little weight" on Zommick's conclusion. The court gave seven reasons for this. First, Zommick testified in his deposition that if he had known about Edna's medical condition and the medications she was taking, he would have taken further steps to determine whether she was under undue influence. Second, although Zommick stated that he typically inquired about prior attorneys, he did not do so here. Third, Zommick conceded that he never saw any meaningful interaction between Marie and Edna. Fourth, Zommick spoke with Edna only three times. Fifth, Marie was present during the majority of the discussions about the

March 2002 amendment. Sixth, Zommick never contacted any of Edna's healthcare providers. Seventh, Zommick wrote Patricia a letter stating that she should returns [sic] certain bonds. Zommick sent a copy of this letter to Marie and not to Edna, which indicates that he had little contact with Edna. The court concluded that Zommick had not acted with due diligence and that he had failed to "properly evaluate whether Edna was being influenced by Marie" during the execution of the March 2002 amendment.

Marie told Bonnie Miller, a social worker who worked with Edna, that she was taking Edna to meet with an attorney. Miller asked Marie whether she was taking Edna to see the attorney who had drafted the original trust; Marie answered in the affirmative. The court found it "compelling" that Marie "went out of her way to misrepresent" the attorney Edna was meeting.

In fact, Miller was concerned over Edna's state of mind. Miller met with Edna on March 7, 2002, the day before Edna executed the March 2002 amendment, and came away from that meeting with concerns about Edna's ability to make changes in the trust.

The court reviewed the testimony of Joyce Gillette, a registered nurse at Long Beach Memorial Hospital, Nadine Akins, another nurse, and Miller; collectively, these three witnesses "painted a consistent picture of a woman whose physical health rapidly declined after Marie moved into the house."

Miller filed a report with the Adult Protective Service that expressed her concern that Marie was not taking care of Edna and that Edna was being influenced by Marie. Gillette explained that the Tele-Med had to be removed because the hospital's liability "was too high," given the "caregiving situation orchestrated by her sister." Nadine Akins, who had been giving Edna 24-hour care, stated that Marie fired her because Nadine would not drive Marie and her husband around.

The court found Gillette, Akins and Miller to be credible, with their concerns noted in contemporaneous writings. On the other hand, the court questioned Marie's credibility, rejecting her assertion that Akins and Gillette summarily quit on their own volition.

Significantly, Edna told Akins the day after Edna executed the March 2002 amendment that she was confused about the fact that an attorney had come to see her and that she did not understand what she was doing. Patricia Tierney testified that Edna called her and told her she had signed something but that she did not know what she had signed. When Patricia explained to Edna the change in the trust effected by the March 2002 amendment, Edna started to cry. In Patricia's words, Edna said that "that's not what I want, and she [Edna] said that's not what Joe would want."

The court noted that, standing alone, procuring an attorney and accompanying Edna to see that

attorney, i.e., Zommick, did not amount to actively participating in the preparation and execution of the March 2002 amendment. The additional evidence, however, that we have summarized above "established by clear and convincing evidence that Marie actively participated in procuring" the March 2002 amendment.

(3) Marie Received an Undue Profit from the March 2002 Amendment

The court analyzed in some detail Edna's relationship with Patricia and with Marie, comparing one to the other. Because the contrast is so clear, it is not necessary to delve into the details of this comparison. The overarching facts are that Patricia had been actively taking care of Edna for 35 years but that Marie had visited Edna only half a dozen times in 45 years, and not at all in 2000 and 2001. The court also found that Patricia's children would be considered to be objects of Edna's "natural bounty." Given the long and intense involvement by Patricia with Edna, and the lack of such a connection between Edna and Marie, the finding that Patricia and not Marie was the more obvious object of Edna's testamentary disposition is amply supported by the evidence.

The court concluded that the evidence supported the presumption that the March 2002 amendment was the product of undue influence. Accordingly, the

court turned to the question whether Marie met her burden of proof that there was no undue influence.

(d) Marie Failed to Carry Her Burden of Proof That the March 2002 Amendment Was Not the Product of Undue Influence

The court found that Marie's case relied on the testimony of two witnesses, i.e., Attorney Zommick and Marie. As already noted, the court did not find Zommick's testimony persuasive.

The court did not find Marie to be credible. The court pointed to several conflicts and inconsistencies in her testimony. At one point she stated that she called Zommick to discuss Edna's bonds but Zommick testified that she called about amending the trust. Marie testified that she did not know about the trust until they arrived for the first time at Zommick's office but a little later she testified that Edna told her about the trust before meeting with Zommick. Marie stated she never met Bonnie Miller, the social worker, but Miller recorded telling Marie that Edna needed a caregiver at least six hours a day and that Marie agreed with this. The court found that "Marie was misrepresenting a majority of the facts to the court. [¶] Of even greater importance to the court, is that Marie was unable to provide the court with any credible explanation for discharging Nadine Akins, orchestrating the removal of the Tele-Med unit, or writing herself and her husband over $26,000 from Edna's account."

The court found the testimony of Miller, Akins and Gillette credible that soon after Marie's arrival they became concerned over the fact that Marie was not providing Edna with proper care. The court rejected Marie's explanation for writing over $26,000 in checks to herself and her husband, which was that this money was used to pay bills. The court noted that all of Edna's bills were on automatic bill pay.

(e) Patricia Tierney Produced Clear and Convincing Evidence That the March 2002 Amendment Was the Product of Undue Influence by Marie

The court again reviewed the evidence, this time under the assumption that the evidence did not establish a presumption of undue influence. If this was the case, the question was whether Patricia Tierney had presented clear and convincing evidence of undue influence. The court answered this question in the affirmative.

Without restating the same evidence we have already summarized, here we note only the court's major factual conclusions.

The court found that the disposition made by the March 2002 amendment was not natural, i.e., that Patricia Tierney was the natural object of Edna's bounty. The court found that in February-March 2002 Edna was in a weakened physical, mental and emotional state. The March 2002 amendment contradicted Edna's previously stated intentions, which

were that Patricia Tierney would be the beneficiary under the trust. The court concluded that "Marie took active steps to isolate Edna from her healthcare [*sic*] providers, friends and family members, leaving Edna completely dependent on Marie for all of her health care and financial needs." Finally, the court concluded that Marie actively participated in procuring the March 2002 amendment.

3. The Judgment

The judgment provides that the March 8, 2002 amendment is void due to the fact that it was the product of undue influence. The judgment also provides that Marie Stacey holds all assets of the trust and estate of Edna Tierney, including income therefrom, as constructive trustee for the benefit of the persons entitled to the distribution of Edna Tierney's estate.

DISCUSSION

1. No Findings Were Required About the $150,109 That Patricia Tierney's Counsel Demanded in December 2004 to Settle the Case

As we noted in *Tierney I,* on September 9, 2005, almost one year after the trial took place, Judge Di Loreto directed Marie Stacey to pay Patricia Tierney $115,442 and $34,667, or a total of $150,109. As we discussed in *Tierney I,* this was the sum demanded by Patricia Tierney's counsel in December 2004 to settle

the case. Without restating our entire discussion in *Tierney I,* here we note only that we set aside this order because it was entered ex parte and because this sum was nothing but a settlement demand, i.e., there was nothing in the record of the trial that supported this award.

Stacey[4] contends that the trial court should have made findings about the sums of $115,442 and $34,667. We do not agree. In the first place, these sums were demands for settlement. As we noted in *Tierney I,* the bases for this demand are not readily apparent, although it can be assumed that it is an approximation of what Patricia Tierney thought that Marie Stacey had taken from Edna's estate. Secondly, the judgment entered on May 10, 2007, provides that Marie Stacey holds all assets of the trust and estate of Edna Tierney, including income therefrom, as constructive trustee for the benefit of the persons entitled to the distribution of Edna Tierney's estate. Thus, whatever sums of money Marie Stacey acquired from Edna and her estate are held by Marie Stacey's estate (see fn. 4, *ante*) as constructive trustee for the benefit of the person or persons who are entitled to Edna Tierney's estate. That is perfectly sufficient for the purposes of this case.

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[4] Since Marie Stacey passed away in October 2007 and her husband Ralph Stacey, the executor of her estate, was substituted for her in this appeal, we will in the balance of the opinion refer to "Stacey" as the litigant on appeal, rather than to Marie.

2. *Stacey Is Holding the Long Beach House as a Constructive Trustee for the Benefit of Patricia Tierney*

Judge Di Loreto also issued an ex parte order on September 9, 2005, directing Marie Stacey to execute a grant deed transferring the residence at [Home Address Omitted] in Long Beach to Patricia Tierney. We also set aside this order in *Tierney I.* Stacey contends that the statement of decision should have contained a finding on what Stacey refers to as the "house in Long Beach."

Stacey is mistaken in contending that the statement of decision is silent on the matter of the Long Beach house. If in fact Marie Stacey's estate presently holds title to this house, the estate does so under the terms of the May 10, 2007 judgment as constructive trustee for the benefit of the person or persons who are entitled to Edna Tierney's estate, i.e., Patricia Tierney.

3. *The Statement of Decision Disposed of All Affirmative Defenses That Were Material*

Stacey contends that the trial court erred in not discussing in the statement of decision the affirmative defenses that were raised in the answer to Patricia Tierney's petition to set aside the March 2002 amendment.

"The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial

upon the request of any party appearing at the trial." (Code Civ. Proc., § 632.) "A trial court rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. . . . Only where a trial court fails to make findings as to a material issue which would fairly disclose the determination by the trial court would reversible error result. Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings. A failure to find on an immaterial issue is not error." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525.)

The foregoing authorities dispose of Stacey's contention. Stacey's affirmative defenses were either immaterial or were actually addressed and disposed of by the statement of decision.

The issue under the petition filed by Patricia Tierney was whether the March 2002 amendment was void and invalid because it was procured by undue influence. The second, third and seventh affirmative defenses alleged that, under a will of April 8, 2002, Marie Stacey, and not Patricia Tierney, was entitled to Edna's estate. But whether there was such a will was not material because Marie Stacey opposed Patricia Tierney's petition on the ground that the March 2002 amendment was valid. That is, the

issue was whether Marie Stacey was entitled to Edna's estate under the March 2002 amendment; whether Marie was a beneficiary under an alleged April 8, 2002 will was not material in the proceedings on Patricia Tierney's petition. But, even if the alleged will of April 8, 2002, is material to the disposition of Patricia Tierney's petition, Stacey failed to cite to any "evidence . . . sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., supra,* 200 Cal.App.3d at p. 1525.) Thus, if there was error, and we do not find that there was error, it was harmless.

The fourth, fifth and sixth affirmative defenses respectively alleged laches, estoppel and unclean hands as defenses. None of these defenses was actually litigated in the trial and there is therefore no evidence that supports any of these defenses. In any event, Patricia Tierney's petition was filed on September 10, 2002, which disposes of laches as a defense. As far as estoppel and unclean hands are concerned, the clear import of the statement of decision is that it was Marie Stacey and not Patricia Tierney who was estopped and who had unclean hands.

The first affirmative defense merely alleges that the petition fails to state facts sufficient to constitute grounds for which relief may be granted. In concluding that the March 2002 amendment was void,

the statement of decision squarely disposes of this defense.

4. The Statement of Decision Is Not Defective

Stacey contends that the statement is defective and incomplete because of the alleged deficiencies that we have addressed in parts 1, 2 and 3 of the Discussion, *ante*. We have explained why Stacey is mistaken. In fact, we find the statement of decision to be thorough and complete in all respects. It certainly explains "the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.)

5. The Finding of Undue Influence Is Supported by Substantial Evidence

Relying principally on Marie Stacey's testimony, Stacey contends that there is no substantial evidence that supports the finding of undue influence.

In contending on appeal that there is no substantial evidence that supports the judgment, an appellant may not rely on only those facts that favor his or her side of the question and ignore the evidence that favors the respondent and supports the judgment. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) The error of a lack of substantial evidence is *deemed waived* if this rule is violated. (*Ibid.*) This rule is important in that it precludes an appellant from effectively ignoring the judgment and retrying

the case on its facts in the appellate court. This rule applies whether the case is tried to a court or a jury. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.)

Stacey's claim of a lack of substantial evidence is all the more remarkable because he concedes that there was a confidential relationship between Edna and Marie. The claim of a lack of evidence is therefore limited to whether Marie actively participated in the March 2002 amendment and whether Marie unduly profited because Patricia Tierney was the more obvious object of Edna's bounty. And on these two issues the evidence that supports the judgment is compelling. It is no exaggeration to say that Marie single-handedly brought about the March 2002 amendment and that her displacement of Patricia Tierney is shocking in its speed and ruthlessness.

Although we need not discuss the matter at all since Stacey is deemed to have waived this contention, we wish to make two observations. First, the trial court's analysis of Attorney Zommick's role, or rather lack of a role, is well-grounded, and, in our view, it is correct on all counts. Second, Stacey's claim that the testimony of Miller, Gillette and Akins is peripheral borders on the specious. The testimony of these caregivers goes to the heart of the matter, which was Edna's physical, mental and emotional vulnerability and Marie's successful effort to exploit those vulnerabilities.

6. Stacey's Claims That the Statement of Decision Is Wrong, Incomplete and Misleading Are Without Merit

Stacey's claim that the statement of decision is wrong, incomplete and misleading relies, for the most part, on Marie Stacey's testimony. Thus, Stacey contends the statement of decision is wrong in suggesting that Marie selected Zommick to prepare the amendment and is also wrong in stating that Marie forced the removal of the Tele-Med.

Not only do these claims violate settled rules of appellate jurisprudence,[5] the fact that Marie testified to the contrary does not make these findings wrong. In fact, the trial court, who is *exclusively* charged with the determination of the credibility of witnesses (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243), found that Marie was not a credible witness. Thus, there are two reasons to disregard Marie's testimony. We disregard evidence that is in conflict with the trial court's determination that rests on substantial evidence (see fn. 5, *ante*), and we accept, as we must, the trial court's finding that she is not credible.

Stacey contends that the trial court's determination that Patricia Tierney was the more obvious

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[5] "Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

object of Edna's bounty is "quite astonishing." We do not find it astonishing that, taking into account Patricia's 35 years of loyal assistance and support, the court concluded that Marie's half a dozen visits over a period of 45 years (and none during 2000-2001 when Edna was ill) would weigh less heavily than Patricia's dedication. Indeed, it is difficult to see how anyone could arrive at a different conclusion.

We find it unnecessary to address in detail other purported defects in the statement of decision as these claims are based on Marie's version of the events.

7. *The Finding That There Was No Credible Explanation Why Marie Stacey Wrote over $26,000 in Checks to Herself and Her Husband Is Affirmed*

The trial court found that "Marie was misrepresenting a majority of the facts to the court. [¶] Of even greater importance to the court, is that Marie was unable to provide the court with any credible explanation for discharging Nadine Akins, orchestrating the removal of the Tele-Med unit, or writing herself and her husband over $26,000 from Edna's account."

Stacey contends that the finding about writings checks over $26,000 to herself and her husband is not specific enough. This finding rests on eight checks (exhibit No.'s 54, 55, 57-62) that Marie admitted she had signed. Because the court did not order Marie to

repay the sum that these eight checks represented, there was no need to specify the exact amount.[6]

Stacey also claims that Marie wrote these checks to cover Edna's bills and expenses. The fact is, however, that Marie testified either that she did not recall what the check was for or she admitted that the check was written for her, or for her husband's, benefit, such as costs of travel and airfare for her husband. Marie identified only one check for $300 as being "probably" for groceries and bills. Given this testimony, it is evident that the trial court's finding that there was no credible explanation for these checks is eminently correct.

DISPOSITION

The judgment is affirmed. Respondent is to recover her costs on appeal.

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[6] We note that these eight checks total $25,300. Two of these checks were for $10,000 and $11,300 and were made payable to Ralph Stacey. When asked to explain the second check, the totality of Marie's response was: "That was the check that – Edna had promised Ralph [Stacey] to come and stay, and she was very ill at the time." We agree with the trial court that an "explanation" of this sort for a check of $11,300 is not credible.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

/s/ Flier
FLIER, J.

We concur:

/s/ Rubin
RUBIN, Acting P. J.

/s/ Bauer
BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES**

SOUTH DISTRICT

In Re the Matter of the EDNA P. TIERNEY LIVING TRUST	Case No. NP009743
PATRICIA M. TIERNEY, Petitioner, vs. MARIE STACEY, Respondent.	JUDGMENT AFTER TRIAL BY COURT (Filed May 10, 2007)

This cause came on regularly for trial on October 7, 2004, in department S of the above entitled court, the Honorable Roy L. Paul, Judge, presiding, sitting without a jury. Petitioner Patricia M. Tierney ("Tierney") appeared by her attorneys, Montgomery Cole of Madden, Jones, Cole & Johnson, and Paul D.

Velasco of Sterzer Velasco. Respondent Marie Stacey ("Stacey") appeared by her attorney, Robert B. Corsun.

Evidence, both oral and documentary, having been presented by both parties, and the cause having been argued and submitted for decision, and a Statement of Decision having been issued by this court on April 18, 2007.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The purported amendment and restatement of the Edna P. Tierney Living Trust, entitled *Edna P. Tierney Trust dated August 3, 1999, as Amended and Restated on March 8, 2002* ("2002 Amended and Restated Trust") and the last will of Edna P. Tierney dated March 8, 2002, are void due to the fact both documents were the product of undue influence exercised by Stacey over the decedent, Edna P. Tierney ("Decedent").

2. By virtue of Stacey's exertion of undue influence over the Decedent, Stacey holds title to all assets of the trust and estate of the Decedent, if any, including, without limitation, any and all income therefrom, as constructive trustee for the benefit of the persons entitled to distribution of the estate of Decedent.

3. Tierney shall recover her costs of suit herein.

DATED: MAY 10 2007

/s/ Judge Roy L. Paul
Roy L. Paul
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, SOUTH DISTRICT

In re the Matter of: **EDNA P. TIERNEY LIVING TRUST**	**Case No. NP009743** **Judge Roy L. Paul**
PATRICIA M. TIERNEY, **Petitioner,** **vs.** **MARIE STACEY,** **Respondent.**	**STATEMENT OF DECISION** **(Filed Apr. 18, 2007)**

PROCEEDINGS

On October 7-8, 2004, having waived jury, the parties appeared in Department South S of Los Angeles County Superior Court, the Honorable Roy L. Paul, presiding. The parties appeared before the court for trial, witnesses were sworn and examined, evidence was marked and received as noted in the minutes, and argument of counsel was heard. Upon conclusion of the case, the court rendered a verdict for the Petitioner and held that certain purported Amendments and Restatements, dated March 8, 2002, to the Edna P. Tierney Living Trust, dated August 3, 1999, are "void due to the fact that the purported Amendments and Restatements executed March 8, 2002, were the product of undue influence exercised by . . . Marie Stacey." RT. 317. The court

gave an explanation of its findings from the bench. The Respondent requested a statement of decision; however, failed to "specify the controverted issues as to which the party is requesting the statement of decision as required by Cal. Code Civ. Pro §632."

Appellant Marie filed a timely notice of appeal from this judgment. Appellant contends that (1) the trial court erred in not causing a statement of decision to be prepared and filed, and (2) the judgment is not supported by substantial evidence. On February 16, 2006, based on a stipulation by both parties, the Court of Appeal consolidated B180387 with B187641. The Court of Appeal reversed and remanded with instruction to prepare a statement of decision, and enter a new judgment based on that statement of decision.

This statement is prepared pursuant to the Second Appellate Division order that a statement of decision was requested but not prepared pursuant to CCP §632. Due to the "conflicts in evidence", this court will "sift and weigh" the evidence as requested by the Court of Appeal, even though pursuant to the minute order dated January 1, 2005, the respondent again failed to specify the controverted issues when requested by the trial court. The court therefore is unable to focus the issues of the statement of decision. The orders of September 9, 2005, are vacated and set aside. Appellant is to recover her costs on appeal. The petitioner filed a proposed statement of decision on February 28, 2007, and the respondent

subsequently filed an objection to the proposed statement of decision.

BACKGROUND

This is an action to set aside the March 8, 2002 Trust Amendment to the 1999 Edna P. Tierney Living Trust (1999 Trust) dated August 3, 1999 on the grounds that the documents were procured by the respondent, Marie Stacey, through the exercise of undue influence over her sister Edna Tierney.

Edna, the decedent, was 86 years old in February and March 2002. RT. 57. She had a number of serious medical conditions, including congestive heart failure, which caused her to be hospitalized on a regular basis. In June of 1999, Edna became the first patient of a new and advanced technology program called the Tele Medicine (Tele-Med) program. The Tele-Med program allowed doctors and nursing staff at Long Beach Memorial hospital to place a direct video monitor in Edna's home in order to monitor her status from the hospital. To be eligible for the new Tele-Med program, the patient was required to have sufficient caregivers at home to ensure medicine and other daily needs of the patient were provided.

In 2000, Edna's only son, Joseph, was diagnosed with terminal cancer. On September 21, 2000, prior to Joseph's passing, Edna amended the 1999 Trust by replacing her sister, Marie Stacey (Marie) with Joseph's wife Patricia Tierney (Pat), as the contingent beneficiary of the Trust should her son preceded her.

(2000 Trust). Edna further provided that Marie "shall no longer receive anything from the trust estate." Joseph died on October 26, 2001; thereby, leaving Pat as the sole beneficiary of the 2000 Trust. Pat also continued to be Edna's primary caretaker, taking responsibility for Edna's finances, banking and healthcare needs. After being released from a two month stay at Bixby-Knolls Towers, a skilled nursing facility, in January 2002, Edna required 24-hour care.

On February 25, 2002, Edna's sister, Marie Stacey, came from her home in Cincinnati, Ohio, to temporarily help with Edna's care. Within weeks of arriving at Edna's, Marie had terminated all of her home health care providers and forced Long Beach Memorial Hospital to remove the Tele-Med monitors from Edna's home. On February 28, 2002, just three days after arriving in California, Marie contacted an attorney to assist Edna in changing her existing estate plan. On March 4, 2004, Marie and Edna went to the attorney's office to discuss Edna's estate. On March 8, 2002, Edna signed the Second Amended Trust (2002 Trust) at her home, which removed Pat and made Marie the sole beneficiary of Edna's estate. Marie also assumed immediate control over Edna's banking and other financial accounts within days of arriving. Edna passed away on August 25, 2002, five months after Marie arrived.

BURDEN OF PROOF REQUIREMENT ON THE ISSUE OF UNDUE BURDEN

The Court may set aside a trust or will where the instrument was obtained by undue influence. Cal. Prob. Code §6104. Generally, the party contesting the validity of a will or trust on the grounds of undue influence bears the burden of proof. Cal. Prob. Code §8252(a). A presumption of undue influence may be raised only by showing the existence of *all* three (3) elements through clear and convincing evidence: (1) that there was a confidential relationship between the decedent and the alleged influencer; (2) the alleged influencer actively participated in the preparation or execution of the testamentary instrument; and (3) the alleged influencer received an undue profit from the testamentary instrument. *Estate of Sarabia*, 221 Cal.App.3d 599, 605; Cal. Prob. Code §16004(c). Upon the showing of these three (3) elements, the burden shifts to the Trust proponent to prove by a preponderance of the evidence that the instrument was not the product of undue influence. Id.

If the party contesting the trust or will fails to establish a presumption of undue influence, the burden remains on the party contesting the Trust or will to establish undue influence by clear and convincing evidence. *Estate of Fritschi*, 60 C.2d 373. The trier of fact must consider the following factors in combination: (1) the provisions of the trust were unnatural; (2) the disposition of the will were at variance with the intentions of the decedent, expressed

both before and after its execution; (3) the relations existing before the chief beneficiary and the decedent afforded to the chief beneficiary an opportunity to control the testamentary act; (4) decedents mental and physical conditions was such as to permit a subversion of her freedom or will; (5) chief beneficiary under the will were active in procuring the instrument to be executed. *Estate of Yale*, 214 C. 115, 122; Witkins Chapter 14, §132.

The judge, sitting as the trier of fact, shall weigh the evidence and may "exercise the prerogatives of a fact trier" by refusing to believe witnesses. *Roth v. Parker*, 57 CA4th 542, 550. The judge may also determine what inferences may reasonably be drawn from the evidence. *Roland v. Hubenka*, 12 CA3d 215, 22.0 (1970). Influence which reaches the stage of being undue influence is not all the same in every case. In one case it takes but little to unduly influence a person; in another case much more . . . accordingly every case must be viewed in its own particular setting." *Estate of Bucher*, *supra*, 48 Cal.App.2d 465 at p. 474.

FINDINGS

1. **PETITIONER PRESENTED CLEAR AND CONVINCING EVIDENCE OF UNDUE INFLUENCE TO ESTABLISH A PRESUMPTION OF UNDUE INFLUENCE AND THEREFORE SHIFT THE BURDEN OF PROOF TO Respondent.**

In order for the court to find a presumption of undue influence, the court must weigh all the evidence presented at trial and establish that the petitioner provided clear and convincing evidence of the following three factors: (a) there was a confidential relationship between Marie and Edna; (b) Marie actively participated in procuring the 2002 Trust; and (c) Marie received an undue profit from the 2002 Trust. For the reasons outlined below, the court finds that petitioner has met her burden to establish a presumption of undue influence by Marie Stacey in the execution of Edna's 2002 Trust.

A. THERE WAS A CONFIDENTIAL RELATIONSHIP BETWEEN MARIE AND EDNA.

Marie was Edna's sister and the existence of a blood relationship between trustor and beneficiary has been held to be sufficient to help establish a confidential relationship. *Estate of Eakle*, 33 Cal.App.2d 379 (1939). Blood relation aside, the courts [sic] finds that Pat's evidence of the interaction between Marie and Edna is sufficient to establish a confidential relationship.

Prior to Marie's arrival in February, 2002, Edna was unable to take care of herself and required 24-hour care, which was being provided by various healthcare professionals and Pat. Within weeks of moving in, Marie took over the role of primary caregiver by firing all of Edna's care givers, thereby forcing Long Beach Memorial Hospital to remove the Tele-Med monitor, and admonishing Pat from entering the home. Marie also took control of all Edna's finances. Edna was completely dependent on Marie for all her healthcare and financial needs during the last five months of her life. For the foregoing reasons, the court finds that petitioner has established, by clear and convincing evidence, that Marie and Edna had a confidential relationship. Marie presented no testimony or argument to dispute the existence of a confidential relationship.

B. MARIE ACTIVELY PARTICPATED [sic] IN THE PREPARATION AND EXECUTION OF THE 2002 TRUST.

Active participation may be established by inference or circumstantial evidence, it need not be direct. *In re Estate of Greuner*, 31 Cal. App. 2d 161, 163. The alleged influencer need not be present in person at the time of the execution of the testamentary document if the influence is present to constrain the party from exercising his free will. *In re Estate of Greuner*, 31 Cal. App. 2d 161, 163.

The court having considered Marie's actions from the time she arrived at Edna's in February until the execution of 2002 Trust, finds that Marie's [sic] actively participated in the 2002 Trust. In making its decision, the court not only considered specific events leading up to the 2002 Trust but, also the credibility of the witnesses at the time of trial.

It is of interest to the court that within weeks of arriving at Edna's, Marie had discharged all of Edna's healthcare providers, orchestrated the removal of the Tele-Med unit and taken control of all Edna's finances. Marie's testimony that these health care workers summarily quit on their own volition and that Joyce removed the Tele-Med because of Marie's disagreement with Pat is speculative. As a result of the petitioner's evidence, the court does not find it probable that after months and years of ensuring Edna was cared for that these healthcare workers would leave Edna with no health care providers.

Collectively, Joyce, Bonnie and Nadine painted a consistent picture of a woman whose physical health rapidly declined after Marie moved into the house. Edna's health declined so rapidly that within five month's of Marie's arrival Edna passed away. As the court notes, Edna's social workers and caregivers continued to worry about the inadequate care Marie was providing to Edna and the adverse affect it was having on her health. The court heard from Bonnie Miller, a social worker assigned to Edna's case, who testified that soon after Marie arrived she filled out a report with the Adult Protective Services due to her

concern that Marie was not taking care of Edna. Her concerns about "Edna's memory and her being influenced" were memorialized in her March 14, 2002 Patient Progress report. RT. 87; EX 22. The court also heard from Joyce Gillette, a registered nurse at Long Beach Memorial Hospital, who spoke with Edna a couple times a week through the Tele-Med. As far back as June 5, 2001, Joyce Gillette expressed her concern in a written report over Edna's ability to care for herself. EX. 4. In regards to the Tele-Med removal, Joyce explained that the liability was too high to keep the Tele-Med unit in Edna's home because of Edna's caregiving situation orchestrated by her sister [Marie.] EX. 15. Finally, the court heard from Nadine, who had been providing Edna with 24 hour care, who stated that Marie fired her because she would not drive Marie and her husband around. RT. 182-83. The court finds the testimony of these healthcare providers to be in all ways credible and notes that the concerns of the healthcare providers were conveyed in contemporaneous writings at the time of the incident and not in preparation for litigation.

Having considered the state of Edna's health at the time of the 2002 Trust, the court then evaluated the attorney's assessment of Edna at the time the 2002 Trust was executed. Only three days after arriving at Edna's, Marie contacted an attorney, Kenneth Zommick, to discuss Edna's estate. RT. 209. Marie testified that Edna initiated the call; however, Kenneth testified that in fact Marie phoned him on or about February 28, 2002 to inquire if he would be

able to assist Edna in changing her Trust. Only after he affirmatively responded, did Marie pass the phone to Edna. Edna then told Kenneth that her intent was to leave everything to Marie. On March 4, 2002, Marie accompanied Edna to Kenneth's office. Both Marie and Kenneth testified that Marie was present during the discussion to make Marie the sole beneficiary of the 2002 Trust. On March 8, 2002, Kenneth came to Edna's home to execute the 2002 Trust. The court notes that although Marie was present in the home when the 2002 Trust was executed, she was in a separate room at the time Edna signed the Trust.

The court acknowledges that neither procuring the attorney nor accompanying Edna to Kenneth's offices is sufficient acts on their own to establish active participation. *Estate of Teel*, 25 Cal. 2d 520, 534. Even taking this into consideration, the court still finds that Kenneth failed to properly evaluate whether Edna was being influenced by Marie during the execution of the 2002 Trust.

While the court acknowledges that Kenneth is a competent attorney with significant experience, the court places very little weight in Kenneth's determination that Edna was not under the influence of Marie because it is not substantiated by the evidence. Even giving him every benefit of the doubt, the court still believes that Kenneth failed to adequately assess whether Edna was free from undue influence from Marie.

In making this decision the court relies on the following: (1) in his own deposition Kenneth stated, "Had I known the factors about her healthcare, her medical condition, her medications, I would have taken further steps to assess if there was undue influence." RT. 224; (2) Kenneth stated that although he typically inquires about prior attorneys, in this case he failed to so." RT 225; (3) Kenneth acknowledges that he never had the opportunity to see any meaningful interaction between Marie and Edna; (4) Kenneth only spoke with Edna three times; (5) the court notes that Marie was present for a majority of his discussions concerning the 2002 Trust; (6) Kenneth as aware of Edna's healthcare provider yet never contacted them; and (7) when Kenneth mailed a letter requesting that Pat return the Bonds, he CC'd Marie but failed to send a copy to his principal, Edna, further demonstrating to the court how little direct involvement Edna had with Kenneth. RT. 225-30.

Aside from Kenneth's lack of due diligence, the court also found it compelling that Marie went out of her way to misrepresent to Edna's healthcare providers who Edna was meeting with to change her existing Trust. Bonnie Miller (Bonnie), social worker from Long Beach Memorial Hospital, testified that when Marie told her that she and Edna were going to meet with an attorney the following day to make some changes to Edna's estate plan, Bonnie inquired whether they would be meeting with the same attorney who created the original Trust. RT. 83. In

response to that direct inquiry, Marie told Bonnie that they would be meeting with the same attorney who drafted the original Trust, even though she knew Kenneth was not the original attorney. Id. In fact, Marie did not take Edna to see the attorney who had prepared the 1999 Trust.

Of interest to the court is that unlike Kenneth who determined Edna was competent and free from undue influence from Marie, Edna's healthcare providers, who spent ample time with Edna and Marie, were concerned about Edna's health and Marie's control and influence over Edna. The court notes that on March 7, 2002, just one day before the 2002 Trust was executed, Bonnie met with Edna. As a result of this meeting, Bonnie expressed her concern about Edna's state of mind and ability to make changes to her estate plan. Therefore, Bonnie believed that an attorney who had some history with Edna would "be in a better position to assess her state of mind, competency and influencing factors" than an attorney with no history. RT. 85. The court finds Bonnie in all ways credible, and places great weight in her ability to evaluate Edna's state based on her prior relationship with Edna. The court did consider Bonnie's testimony that when she asked Edna why she changed her Trust Edna replied: "[Marie] said that Pat didn't want to do it anymore." The court placed little weight on the fact that Marie may have misrepresented facts to Edna about Pat which brought about Edna's sudden dislike towards Pat. RT. 95; *In re Estate of Morcel*, 162 Cal. 188, 195.

The petitioner also presented the court with strong and compelling evidence from Nadine and Pat regarding Edna's state of mind right after the execution of the 2002 Trust. Edna's caretaker, Nadine, testified that shortly after signing the 2002 Trust, Edna told her that an attorney had come to her house, that "she was confused by it all and she didn't understand what she was doing," and "what she had planned with her son before he died is what she wanted to happen." RT. 185-86. Pat testified that "Edna called me, and she said that she signed something, she didn't know what it was." RT. 126. After explaining the change to her Trust, "Edna started to cry." RT. 126.

The evidence of misrepresentation and overreaching by Marie, coupled with all the factors set forth above establishes by clear and convincing evidence that Marie actively participated in procuring the 2002 Trust.

C. MARIE RECEIVED AN UNDUE PROFIT FROM THE 2002 TRUST AMENDMENT.

To determine which party would be the more obvious object of the decedent's testamentary disposition, the court derives from the evidence introduced at trial an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent. *Estate of Mann*, 184 Cal.App.3d 593, 612-613. Dispositional provisions in previous wills executed by the decedent, or past expressions of the

decedent's testamentary intentions may also be considered. *Estate of Lingenfelter*, *supra*, at p. 584; *Estate of Garibaldi*, 57 Cal.2d 108, 113.

In the present case, it is uncontroverted that Marie was a beneficiary to Edna's original 1999 Trust, that Marie was removed as a contingent beneficiary in Edna's 2000 Trust and replaced with Pat, and the 2002 Trust Amendment elevated Marie to the status of sole beneficiary of Edna's trust excluding Pat entirely. Marie claims that due to bloodlines, she is the "natural bounty."

The court notes first that bloodline alone is insufficient to establish Marie was the obvious object of Edna's Trust. Weighing all the evidence presented at trial, including Marie's evidence of bloodlines against Pat's evidence of servitude and assistance to Edna over the last 35 years, it appears to the court that Pat is the more obvious object of Edna's Trust. The court considered the following evidence in making its decision. First, Marie is not the only "natural bounty." Pat's children would also be considered a "natural bounty due to bloodlines. Second, petitioner provided ample evidence of Pat's dedication and years of caring for Edna, even after Joe passed away. Third, after learning that her only son would predecease her, Edna amended her 1999 Trust, making Pat the contingent beneficiary behind Joe. Edna amended her Trust because knew that Pat would be the one to take care of her. Fourth, Pat cared for Joe, Edna's only son, while he was dying from cancer. Finally, although

given less weight than the other evidence, Pat is the mother of Edna's only grandchildren.

The court considered Pat [sic] testimony regarding her close relationship with Edna over the last 35 years to be credible. Following the death of Edna's husband in 1971, Pat and Joe assisted Edna with her significant health care, personal and financial needs, including driving her to doctor's appointments, running personal errands, paying her bills, balancing her checkbook and assisting with getting her back on her feet after her numerous operations and medical procedures. After Joe became ill with cancer in May of 2000 and was no longer able to help, Pat assumed many of these responsibilities herself. Pat continued to provide such assistance until shortly after Marie arrived.

The court notes, that Pat's relationship with Edna was further supported by Joyce Gillette's testimony. Joyce, a registered nurse with Long Beach Memorial Hospital, had been involved with Edna's healthcare since June 1999. Joyce testified that the Hospital sought assistance from Pat when Edna became more forgetful about taking her medication because she knew that Pat was already assisting Edna with her personal needs. RT. 16. Joyce further testified that part of the 24-7 plan, which permitted Edna to remain in her home, was contingent upon Pat being able to come in and pour her medications and continue to handle her finances. RT. 26. The court did consider Joyce's February 7, 2002 referral form where she did state her concern over a conflict

between Pat and Edna over "finances, checks, etc.," that Edna continued to want to live alone and continues to be confused." EX. 7. Nevertheless, the court did not find this "conflict" between Pat and Edna to be sufficient to destroy the courts finding of a strong relationship between Pat and Edna.

Having considered the years of servitude provided by Pat, the court then considered all of Edna's prior Trusts. After Edna's son as diagnosed with terminal cancer in 2000, Edna and Joe went to the same attorney who executed the original trust, and amended her 1999 Trust, making Pat the first contingent beneficiary behind Joe. (2000 Trust) RT 110. Edna amended the 1999 Trust because she knew Joe was going to pass before her and Pat would be left to take care of her. RT. 112. The court then considered the 2002 Trust in which Edna replaced Pat with Marie. Of significance to the court is that unlike the 2000 Trust, where Edna went to her original attorney, for the 2002 Trust Edna did not go to her original attorney. This distinction is important to the court because as the evidence above has established, there was concern by all of Edna's caretakers that she was being influenced by Marie to make the amendment. It appears to the court, that the 2000 Trust better assists the court in determining Edna's intentions.

The court next considered Marie's relationship with Edna. The court finds Pat's testimony regarding her observations of Marie's relationship with Edna to be credible. Pat testified that although Edna and Marie generally got along well. Marie lived in

Cincinnati, Ohio prior to 2002 and that during the 45 years Pat knew Edna, Marie only came to visit a half dozen times. Pat also testified that Marie never visited between 2000 and 2002. The court did not find Marie's testimony to be credible based on the inconsistency of her statements. Marie was unable to tell the court exactly how many times she had visited Edna over the years. Although Marie testified that "she was the one that came out and took care of [Edna]" and that she visited six times in 1999, she stated that she had never met Bonnie Miller. Again, Marie's testimony was contradicted. Bonnie had not only met Marie but had provided Marie with detailed instructions on Edna's care requirements. Marie stated that she took care of Edna when she was ill, yet Joyce stated that it was Pat that cared for Edna. In fact, it was because of Pat's care and not Marie's, that Edna was able to remain in her home.

The court, having weighed all of the evidence presented at trial, has derived an appreciation of the relative standing of Marie and Pat to Edna and has determined that Pat would be the more obvious object of Edna's testamentary disposition.

The court, having weighed the evidence presented by both parties at trial, finds that the petitioner, Patricia Tierney, proved by clear and convincing evidence that: (a) there was a confidential relationship between Marie and Edna; (b) Marie actively participated in procuring the 2002 Trust; and (c) Marie received an undue profit from the 2002

Trust. Therefore, the burden of proof shifts to Marie to establish there was no undue influence.

2. MARIE FAILED TO CARRY HER BURDEN OF PROOF TO ESTABLISH CONTRARY EVIDENCE

The court did not find Marie's evidence at trial persuasive or sufficient to meet her burden of proof. While the court's decision is not based on the number of witnesses Marie provided at trial, the court's decision is based on the credibility of the witnesses. The court looked in turn at each of Marie's witnesses, herself and Kenneth Zommick. Based on the lack of credibility, the court placed little weight in either of their findings or testimony.

First, the court finds that Marie did not provide this court with persuasive evidence that either Kenneth's assessment of Edna was correctly provided or in the alternative, that Edna was free from undue influence from Marie. The only evidence Marie presented to this court on this issue was the testimony of Kenneth. As previously noted, the court placed little weight in his findings. The court was distressed by Kenneth's failure to take the standard precautionary steps to ensure Edna was free from undue influence from Marie. The evidence shows that Marie contacted Kenneth, accompanied Edna to his offices and was present during the discussion of the Trust. Even Kenneth himself admitted that he never had the opportunity to see any meaningful interaction

between Marie and Edna outside his office. RT. 225-30.

Second, the court considered Marie's own testimony. Marie's testimony simply was not found to be credible by the court. Marie continually provided conflicting testimony. Marie's testimony regarding the Trust itself was contradicted by her own testimony and Kenneth. Marie said she called Kenneth to speak about Edna's bonds. Kenneth's testimony did not corroborate this contention. Marie also told the court that she was unaware that Edna had a Trust until she went to Kenneth's office, yet moments later she told the court Edna told her about the Trust prior to going to Kenneth's office. RT. 164, 254.

The court also notes that Marie was unable to provide credible evidence regarding her relationship with Edna. Of significance to the court is that Marie stated that she never met Bonnie Miller, Edna's social worker. Bonnie has a record of not only meeting Marie but also stressing to Marie the need for there to be a caregiver at least six hours a day and at night and that Marie expressed agreement. RT. 87, 158, 160. It appeared to the court that Marie was misrepresenting a majority of the facts to the court.

Of even greater importance to the court, is that Marie was unable to provide the court with any credible explanation for discharging Nadine Akins, orchestrating the removal of the Tele-Med unit, or writing herself and her husband over $26,000 from Edna's account. EX. 15.

When Marie arrived, Edna's health was stabilized and she had three people taking an active role in her healthcare. The court finds no credibility in Marie's contention that all three people summarily, on their own decided to just dissolve their relationship with Edna. The court again finds the testimony of the healthcare provider to be more credible that [sic] Marie's testimony. Marie denied ever hearing anyone's concerns that Marie was not providing Edna the proper care. Yet as the court notes, Joyce, Bonnie and Nadine all provided testimony to the contrary. As early as February 28, 2002, just days after Marie arrived, Edna's healthcare providers were toting in their Nurse Progress Reports that Marie was frustrating the paid caregiver by "attempting to micromanage [Edna's] care." EX.10.

The court also notes that Marie was unable to provide a credible explanation for transferring more than $26,000 from Edna's account to her and her husband, Ralph Stacey. EX. 54, 55, 57-62. Even after Edna entered the hospital in April, Marie continued to write checks from Edna's account. RT. 273. Marie testified that she needed the cash to pay bills, such as gas, electric and water; however, Pat previously testified that all Edna's bills were on automatic bill pay. It appears to the court that there would be no reed for Marie to pay these bills. Furthermore, Marie was unable to provide the court with any evidence that Edna had previously transferred such large sums to Marie. From the evidence that Marie provided the court, including her own testimony that she

"needed a little extra cash" and was under the belief that Edna had a million dollars in bonds when her husband died, it is reasonable for the court to infer that Marie's wrongful actions were instrumental in procuring the transfer of funds from Edna's account to her own. RT. 270, 271, 278.

In conclusion, based on all the evidence presented at trial, the court finds that Pat has produced sufficient evidence to establish each of the three elements necessary to raise the presumption of undue influence and shift the burden of proof to Marie. The court further finds that Marie has failed to meet her burden. Therefore, the court finds the 2002 Trust void due to undue influence by Marie Stacey.

3. EVEN IF THE PRESUMPTION OF THE UNDUE INFLUENCE WAS NOT MET, THE COURT STILL FINDS THAT PAT PROVIDED CLEAR AND CONVINCING EVIDENCE THAT 2002 TRUST WAS THE PRODUCT OF UNDUE INFLUENCE BY MARIE.

Notwithstanding the court's finding that the burden of proof shifted, Pat provided clear and convincing evidence that the 2002 Trust was the product of undue influence by Marie. If the presumption of undue influence is not met, the court must consider all the factors in combination to justify a finding of undue influence by circumstantial evidence. No one factor is sufficient to establish undue influence. While the existence of one factor may be "highly probative," it is not essential that each factor

be established for finding undue influence. *David v. Hermann*, 129 C.A.4th 672, 684 (2005).

In making its decision, the court will analyze all the required factors and weigh the evidence presented at trial. For all the reasons set forth above and those further detailed below, the court finds the petitioner presented clear and convincing evidence at trial that the 2002 Trust was the product of undue influence exercised by Marie Stacey.

A. THE PROVISIONS OF THE 2002 [sic] WERE UNNATURAL.

The court recognizes that natural bounty is an important factor in determining if the Trust was unnatural, however it is not the only factor to be considered. Courts have continually looked to the testator's affection. The court notes, that based on the evidence presented at trial Pat is the more likely object of the 2002 Trust. Pat took on Edna's healthcare and financial needs alone after the passing of Joseph in 2002, and Edna knowing that Pat would be taking care of her, made Pat the contingent beneficiary of the 2000 Trust. Therefore, the court does find that the provisions of the 2002 Trust were unnatural.

B. DECEDENT WAS IN A WEAKENED PHYSICAL, MENTAL AND EMOTIONAL STATE WHEN SHE EXECUTED TO 2002 TRUST.

The court finds that the evidence establishes that Edna was clearly in a weakened physical and mental state when she executed the 2002 Trust. The evidence is undisputed that Edna was 86 years old and suffering from congestive heart failure when she executed the 2002 Trust. Several non-interested witnesses, including Bonnie Miller (social worker), Joyce Gillette, (a registered nurse at Long Beach Memorial Hospital) and Nadine, (Edna's caregiver), all testified that Edna was completely dependent on her healthcare providers, Pat and the Tele-Med unit. Unlike Marie, who could only provide her own testimony at trial, Edna's caregivers presented the court with contemporaneous writings created at the time of their concern.

Not only was Edna physically weak, but also mentally weakened. The court noted that Edna's healthcare providers stated that Edna often forgot to take her medicine and Edna's neighbor stated that Edna would often complain that she had not "seen Joe" for days, yet Joe had just been to visit the day before. RT.246. The court gave little weight to the evidence that Edna forgot to take her 19 medications each day because many 86 year olds could forget to take 19 medicines each day.

C. THE DISPOSITION OF PROPERTY IN THE 2002 TRUST WAS DIFFERENT FROM DECEDENTS PREVIOUSLY EXPRESSED INTENTIONS.

Evidence that the testator was susceptible to outside pressures because she was in a weakened state of mind (e.g. senile, lonely, ill, distraught from death of loved one), may demonstrate that pressure from another overcame the testators free will. *Estate of Yale*, 214 Cal. 115. The court recognizes the right of an individual to change their trust, even right up until their death. However, what concerns the court is the drastic difference between Edna's 2000 Trust Amendment and the 2002 Trust Amendment that occurred three days after Marie's arrival.

As previously explained by the court, Edna and Joe went to the same lawyer who prepared her original 1999 Trust to make the 2000 Crust Amendment. Edna amended her 1999 Trust because knew that Pat would continue to be the one to take care of her after Joe passed. RT. 112. Since the court considered the 2000 Trust Amendment; it must also consider whether Edna's intentions were expressed in the 2002 Trust Amendment. Of significance to the court is that unlike the 2002 Trust, which was drafted by an attorney unfamiliar with Edna or her previous Trusts, the 2001 Trust was drafted by the same attorney who drafted Edna's original 1999 Trust. The evidence supports the courts finding that the 2000 Trust Amendment be given greater weight and serve as a more credible expression of Edna's intentions.

D. MARIE HAD THE OPPORTUNITY TO CONTROL THE CREATION OF EDNA'S 2002 TRUST.

The opportunity to influence a testator is the weakest of the factors, and standing alone, carries no weight. *Estate of Killborn*, 162 Cal. 4, 11. The court acknowledges that mere opportunity to control the creation of a testamentary document, even when coupled with motive and interest to do so, does not give rise to the inference that undue influence was in fact exercised.

In the present case, the court finds that not only did Marie have the opportunity to control the creation of the 2002 Trust but, she in fact did act upon this opportunity. It appears to the court, that Marie took active steps to isolate Edna from her healthcare providers, friends and family members, leaving Edna completely dependent on Marie for all of her health care and financial needs. It is clear to the court, that based upon all the evidence presented at trial, that Edna was unable to take care of herself and needed 24 hour care. EX. 19. The court notes that even Marie testified that Edna was aware that she "had to have someone" to take care of her. RT. 264. Knowing that Edna required such care, Marie still proceeded to fire Nadine, failed to provide the care needed to keep the Tele-Med in Edna's home, and admonished Pat and her family from Edna's home. Marie never provided any evidence that she secured new caregivers for Edna or that she herself was sufficiently skilled in

providing the required level of care necessary to keep Edna alive. EX 15.

Aside from taking away Edna's healthcare providers, Marie also took control of all Edna's finances. The court notes that on March 4, 2002, one of Edna's nurses, Sarah Delany, sent a referral form to Memorial Home Health Care Social Work. Sarah stated in her referral that: "sister planning to take control of [Edna's] finances, [Edna] needs advocate." EX. 19. Based on the evidence presented at trial, the court can infer that Marie created an environment which required Edna to be dependent on her for all her needs. The court therefore finds that Marie created and took advantage of the opportunity to control the creation of the 2002 Trust.

E. MARIE ACTIVELY PARTICIPATED IN PROCURRING [sic] THE 2002 TRUST.

To summarize the events mentioned above, Marie lied to Bonnie Miller about seeing the lawyer who drafted Edna's 1999 Trust, contacted Kenneth herself, accompanied Edna to Kenneth's office, was present when Edna discussed the provisions of the Trust in Kenneth's office and was present in the home when Edna executed the 2002 Trust. This evidence establishes sufficient evidence for the court to find that Marie actively participated in procuring the 2002 Trust.

In conclusion, having weighed and sifted all the evidence from both parties and having considered all

necessary factors, the court finds that Pat met her burden and provided sufficient evidence to establish by clear and convincing evidence that the 2002 Trust was procured by undue influence by Marie Stacey and therefore void.

COURT ORDER

The court orders counsel for the petitioner to prepare the Judgment and Notice of Entry of Judgment within 10 days and file with the court a Proof of Service on counsel for the respondent. The court will hold the Judgment for 5 days to allow respondent to file objections as the form and content of the Judgment only, having already issued a settled Statement of Decision.

Dated: April 18, 2007

/s/ Roy L. Paul
Roy L. Paul
Judge of the Superior Court

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 8

May 01, 2009

Jeffrey L. Garland
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Hailey, ID 83333

PATRICIA TIERNEY,
Plaintiff and Respondent,
v.
ESTATE OF MARIE STACEY et al.,
Defendants and Appellants.

B200516
Los Angeles County No. NP009743

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Division Eight – No. B200516

S173036

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PATRICIA M. TIERNEY,
Plaintiff and Respondent,

v.

RALPH L. STACEY, JR., as Executor, etc. et al.,
Defendants and Appellants.

(Filed Jul. 8, 2009)

The petition for review is denied.

GEORGE
Chief Justice